IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 216 OF 2003

1) Sunil Vishwanath Gaikwad

2) Sachin Manohar Khambe ... Appellants.

vs.

The State of Maharashtra. ... Respondents.

Mr. S.R. Pasbola for the appellants.

Mr. S.R. Borulkar, PP for the State.

Coram: J.N. PATEL &,

R.S. MOHITE, JJ.

Date: 25th January, 2007.

ORAL JUDGEMENT : (Per J.N. Patel, J.)

. In M.C.O.C. Special Case No. 13/2000 along with Sessions Case No. 1028/2000 the appellants came to be tried by the Special Judge under the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as the (MCOC Act, 1999) for Greater Bombay on a charge of conspiracy to commit murder of the deceased Ziauddin Naimul Haque Shaikh Usmani along with others, viz., wanted accused Subhashsingh Thakur, Shyam Kumar Girikapatti and other unknown persons and in furtherance of the aforesaid conspiracy they along with

their unknown accomplices on 20.1.2000 at about 7.30 a.m. to 7.35 a.m. in front of Maharashtra Bakery, Road No. 1, Park Site, Vikroli, committed murder of Ziauddin Naimul Haque Shaikh Usmani and thereby committed an offence punishable under Section 302 read with Section 34 of the Indian Penal Code and Section 120-B of the Indian Penal Code. They were also charged and tried for having committed offence punishable under Section (1B), clause (a) of Section 25 of the Arms Act, 1959 for being in possession of pistol and revolver of which they had no licence and that the said fire arms were used in the commission of the offence and they were charged and tried for having committed offence under section 27 of the Arms Act, 199.

2. The two appellants were also charged for having committed offence under sub-section (4) of Section 3 of MCOC Act, 1999 for being members of the Organised Crime Syndicate and that the murder of deceased Ziauddin Naimul Haque Shaikh Usmani is also an offence committed by Organised Crime Syndicate as defined in clause (e) of sub-section (1) of Section 2 of the MCOC Act, 1999 and thereby committed an offence punishable under clause (i) of sub-section (1) of Section 3 of the said MCOC Act, 1999 and also under sub-section (2) of Section 3 of the said Act. An additional charge came to be framed against the appellant original accused no. 1 under the Arms Act. The Special Court found them guilty of having committed offence punishable under

Section 302 read with Section 34 along with Section 120-B of the Indian Penal Code and sentenced them to imprisonment for life and also a fine of Rs. 10,000/- each, in default to suffer RI for 10 months. Special Court also convicted them for offences punishable under Section 25(1B) of the Arms Act and sentenced them to suffer RI for three years and fine of Rs. 1000/- each and in default to suffer RI for one month and for the offence punishable under Section 27 (1) of the Arms Act, they were sentenced to suffer RI for seven years and also to pay a fine of Rs. 2000/- each and in default RI for two months. The appellants were acquitted of the charge of offences punishable under Section 3 (1) and 3 (2) of the MCOC Act, 1999. The Court did not impose separate sentence for the offence punishable under Section 120-B IPC and ordered that the substantive sentences for the offences punishable under the Arms Act to run concurrently and also granted set off as provided under Section 428 of the Cr. P.C. It is this conviction and sentence which is the subject matter of challenge in this appeal.

3. In nut-shell, the prosecution case is that the appellants are the members of the organized crime syndicate led by Subhashsingh Thakur and others who conspired to commit murder of Ziyauddin Naimul Haque Shaikh Usmani as he has expressed his hostility towards Subhashsingh Thakur. It would be pertinent to note here that subsequently Subhashsingh Thakur and his

associates, who were wanted in the case, came to be arrested and charge sheeted in the said case and were discharged (MCOC Case No. 13/00 and 18/00). The deceased Ziyauddin Naimul Haque Shaikh Usmani, the resident of Bandra was in construction business which he was running in the name and style of Abhijeet Enterprises. He was residing separately from his family members who were owning a restaurant by name Bilal Restaurant situated at Agra Road at Ghatkopar and were residing at Vikroli, Park Side, Road No. 1, Lower Depot Pada, Room No. 384, Mumbai 400 079. The deceased Ziyauddin Naimul Haque Shaikh Usmani had a Maruti Zen and used to come and reside with his other family members on holidays and week ends.

4. According to the prosecution, in the evening of 19.1.2000 deceased Ziyauddin along with his family members came to reside with his brother Mohd. Jakaullha Namul Haque Usman (PW-4) and other members of the family and his mother. On the next day in the morning he came out of the house. As he did not come back for some time, his wife got anxious and expressed it to her brother-in-law i.e. Mohd. Jakaullha Namul Haque Usman (PW-4). Mohd. Jakaullha came out of the house in search of his brother to see what has happened, somebody informed him that Ziyauddin has been shot. So he rushed towards the place where Ziya’s car was parked i.e. in front of Maharashtra Bakery. But he noticed that the front door of the driver’s side was

open. Ziya was sitting on the driver's seat and was bleeding. On seeing this, he took his brother Ziya in a rickshaw to Rajawadi Hospital. There on examination, Ziya was declared to be dead.

5. Thereafter the police came to the hospital and after dead body of Ziya was identified by his brother, statement was recorded which was treated as FIR. The police then carried further investigation like drawing of inquest panchanama, seizure of the articles like clothes and contents from the person of the dead body. Scene of offence panchanama came to be prepared and while examining the maruti car, the police got two lead pieces of bullets in the maruti car, a tooth which had been lying there and also blood samples from the car was taken charge of. The same was packed and sealed in the presence of panchas. The dead body was sent for post mortem examination and, thereafter it was handed over to relatives of the deceased. W.P.S.I. Nilam Samant (PW-18) was at the relevant time on duty at the Park Side Police Station. In the course of investigation statements of witness came to be recorded.

6. It is the case of the prosecution that on 21.1.2000 at about 4.00 to 4.30 p.m. one rickshawala by name Prakash Harishchandra Pidankar (PW-11) came to the police station and gave certain information and his statement came to be recorded by W.P.S.I. Nilam Sawant

(PW-18). It so happened that the appellant accused no. 1 Sunil Vishwanath Gaikwad came to be arrested by the team of officers led by PSI Prinam Namdev Parab (PW-6) and PSI Ganesh Kashinath Lahane (PW-7) of Unit-VI of DCB CID on 3.2.2000 near New Welcome Hotel at Ghatkopar on the basis of certain information received by the police. Therefore, as soon as he was apprehended panchas were requisitioned. In the presence of panchas accused was searched and police found Bulgarian made pistol containing live cartridges on the person of the appellant-accused and four more live cartridges in the right side pant pocket of the said accused. As he was not having licence to possess the pistol and cartriges, a FIR Exhibit-26 came to be lodged under the Arms Act against the accused.

7. On interrogation of this appellant-accused it was found that he was concerned with the offence registered vide Crime No. 10/02 by Park Side Police Station. Similarly, the appellant-accused no. 2 came to be arrested by team of officers led by Sohel Mohd. Siddiq Buddha (PW-10) and Vilas Vishnu Joshi (PW-13) of Santacruz Police Station at about 15.20 hrs. along with two others near Ambedkar College. On their search in the presence of panchas, the police found a loaded revolver on the person of appellant-accused Mr. Sachin Manohar Khambe and other articles like mobile phone, sim card, etc., which came to be packed and sealed in the presence of the panchas and FIR also came to be

lodged for possession of arms and ammunition without licence. During further investigation he was also found to be connected with murder of Ziyauddin and, therefore, his custody was taken in the investigation of that case. Fire arms and ammunition seized from both the accused had been subsequently forwarded to Ballistic expert and Forensic Science Laboratory.

8. Thereafter the investigation was handed over to the Senior PI Shri Dani.

9. In the course of investigation, the police found that the deceased Ziyauddin has been murdered by an organized crime syndicate and, therefore, the investigating officer made a proposal for seeking approval of the Additional Commissioner of Police - North-West Div. Mumbai for registering the information of organised crime as required under section 3(1), (2), (3) and (4) of the MCOC Act, 1999 which came to be accorded on 12.6.2000 against the appellants accused along with their associates and the investigation was taken over by Nanasaheb Hiramal Chavan (PW-21) who was then the Assistant Commissioner of Police, Ghatkopar Division. The further investigation in the case was thereafter conducted by the team lead by ACP Chavan.

10. According to the prosecution, the appellant accused Sunil Vishwanath Gaikwad and Sachin Manohar Khambe volunteered to make a confession which came to

be recorded by DCP Padavi. Further, in the course of investigation, identification parade came to be held on 2.5.2000 where the suspect original accused no. 1 Sunil Vishwnath Gaikwad came to be identified by Prakash Harishchandra Pidankar (PW-11) and Rahil Rafiq Shaikh (PW-15). On 23.5.2000 the test identification parade was held in respect of identification of original accused no. 2 Sachin Manohar Khambe and these two witnesses identified them. On completion of the investigation, charge sheet came to be filed against the accused persons in the Court of Special Judge.

11. In reply to the charge the accused persons pleaded not guilty and claimed to be tried. On conclusion of the trial Special Court found that the prosecution has proved that Ziyauddin died a homicidal death due to fire arm injuries caused by the accused persons and held them guilty of having committed offences under Section 302 read with 34 and/or 120-B of the IPC and so also for having committed offences under Section 25(1B) and Section 27(1) of the Arms Act.

12. Mr. Pasbola, the learned counsel appearing for the appellants submitted that the appellants-accused have been falsely implicated in the case by foisting the fire arms and cartridges on them and their case is dependent on evidence of PW-15 Rahil Rafiq Shaikh who claims to be the sole eye witness and the auto rickshaw driver in whose auto rickshaw the appellant accused

escaped the scene of occurrence i.e Prakash Harishchandra Pidankar (PW-11). It is submitted that both these witnesses are got up witnesses and, therefore, it would be most unsafe to rely on their evidence to hold the appellants accused guilty. It is submitted that in so far as PW-11 Prakash Harishchandra Pidankar is concerned, he had no occasion to see the persons who boarded his auto rickshaw and that is why he could not identify them in the court and it has come in his evidence that he has also not seen them in the test identification parade. Mr. Pasbola, the learned counsel for the appellants, submitted that Rahil Rafiq Shaikh (PW-15) who is the sole eye witness examined by the prosecution, his evidence is not corroborated by the evidence of the complainant, brother of the deceased, Mohd. Jakaullha Namul Haque (PW-4). As it is the case of the prosecution that this witness went to the house of Jakaullha and informed them that the deceased Ziyaudden was lying in injured condition in his Maruti car. Further, for two days this witness did not disclose the incident to the family members of the deceased or to the police who had already reached the spot and in so far as the identification of the suspects in the test identification parade is concerned, has no evidentiary value for the reason that the test identification parade was conducted after much delay and the suspects were shown by the police to these witnesses.

13. Mr. Pasbola submitted that the other set of evidence is in the form of arrest and recovery of weapons from the accused persons. It is the contention of the accused that they were taken in custody by the police much before the date of arrest shown in the charge sheet and in support of that the appellant accused no. 1 has examined his aunt Smt. Illabai Maruti Kharat (DW-1) who has deposed to the effect that the appellant accused was picked up on 1.2.2000 which shows that the case of the prosecution that he was arrested on 3.2.2000 is totally false and in his confessional statement also the accused has given the date of arrest as 1.2.2000. This has been corroborated by the evidence of Illabai.

14. Mr. Pasbola has mainly attacked the confessions of the two accused recorded by DCP Swaroopsingh K. Padavi (PW-16) on the ground that the confessional statements are recorded belatedly i.e. after the accused had been in the custody of the police. The confessions are recorded in contradiction of rule 3 (4) of the MCOC Act, 1999 and the confessional statements of the two accused were recorded at different times is in the nature of carbon copy. It is further submitted that the DCP has failed to comply with the requirements of Section 18 (4) and (5) of the MCOC Act and contrary to the rules which provides for safeguards while recording such confessions and the time for revision given to the

accused persons was only 18 hours whereas it is mandatory to give at least 24 hours time when accused got retracted and he wants to make a confession. Further those confessions were forwarded along with the accused persons to the Chief Metropolitan Magistrate. The Chief Metropolitan Magistrate has failed to verify the same as required under Section 18 (6) of the MCOC Act of 1999. It is submitted that both the accused have retracted their confession and even otherwise also the confessional statement of the accused is a weak type of evidence and cannot form the basis for conviction.

15. Mr. Pasbola submitted that so far as seizure of the weapons is concerned, the seizure panchanama and the panchas to the seizure do not support the prosecution case that the seized articles were wrapped, sealed and signed by the panchas at the time of the seizure on the accused being arrested. Further, there was delay in forwarding the fire arms and cartridges seized from the accused persons to the forensic laboratory and, therefore, the unexplained delay in forwarding these articles to the ballistic expert itself makes the prosecution case doubtful and the possibility of planting the fire arms and the two lead pieces - projectiles found on the spot to connect the appellant accused, cannot be ruled out. It is submitted that in so far as the evidence of forensic report is concerned, particularly that of the ballistic

expert, it is highly unsafe to rely on the said report as the prosecution has not led any evidence to show that the articles seized from the spot are the same which were sent to the ballistic expert and, therefore, the prosecution having failed to proved its case beyond reasonable doubt, the accused persons deserve to be acquitted.

16. Mr. Pasbola, the learned counsel for the appellants, submitted that the investigating agency in order to get advantage of the provisions of the MCOC Act, 1999 falsely implicated the accused persons under the said Act and they have no evidence against them to connect them with the murder of Ziyauddin and the whole exercise was undertaken merely to bring the accused persons within the purview of the said Act so that they could conveniently record their confessional statements. Therefore, the original accused deserves to be acquitted.

17. Mrs. Kejeriwal, learned APP, submitted that the prosecution was justified in invoking the provisions of the MCOC Act, 1999 taking into consideration that Ziyauddin was shot dead by the appellants-accused who were members of the organized crime syndicate. At the stage of investigation when it was revealed, the approval was sought from the competent authority and, therefore, it cannot be said that they were falsely implicated in the said case by

applying MCOC Act, 1999. It is submitted that as the investigating agency could not collect sufficient evidence to prove the case, the appellants accused as well as other suspects got advantage and were acquitted from the provisions of the MCOC Act, 1999 otherwise the prosecution has clearly established the fact that it is the appellants accused who have committed murder of Ziyauddin by using the fire arms.

18. Mrs. Kejriwal, the learned APP, submitted that both the accused persons came to be arrested on the basis of certain information received by the police and by different agencies and not by Park Side Police Station and it is in the course of their interrogation that they were found to be involved in the commission of murder of Ziyauddin and that is how their custody was taken in the present case. In the course of investigation the prosecution has been able to prove the ammunition / fire arms which came to be seized from them at the time of their arrest were used by them in committing murder of Ziyauddin which has been duly established by forensic evidence brought on record. It is submitted that the contention of the learned counsel for the appellant accused that the fire arms and cartridges were foisted on the accused persons is totally unfounded as the projectiles which came to be seized from the motor car of Ziyauddin in which he was shot by the assailants were independently seized, sealed and forwarded to the ballistic expert and it

tallied with the fire arms and ammunition seized from the accused persons for which there has been no explanation coming forward from the accused persons. It is submitted that the appellants accused have not disputed that they were found in possession of fire arms and ammunition and this corroborates confessional statement recorded by DCP Padavi. It is submitted that the retraction of the confession made before the DCP by the appellants accused is an afterthought and was only taken into consideration against the appellants accused as there is independent evidence and material placed in the trial to connect the appellants accused with the crime.

19. Mrs. Kejeriwal, the learned APP, submitted that the plea of the appellants accused particularly, appellant accused no. 1 that he was arrested on 1.2.2000 instead of 3.2.2000 merely because he has stated so in his confessional statement and examined his aunt cannot be accepted for the very reason that the appellant accused has been arrested on specific information on 3.2.2000. It is submitted that if the evidence of DW-1 Smt. Illabai, the aunt of the appellant accused is seen, she being the highly interested witness has only tried to come to the rescue of her nephew. Otherwise her evidence is totally unreliable. It is submitted that for the sake of argument even if it is accepted that the appellant accused was arrested earlier, still it would not make

any difference and, therefore, this plea by itself goes to show the complicity of the accused.

20. The learned APP submitted that the trial Court has examined each and every aspect of the case and rightly come to the conclusion that the appellants -accused are the persons who have committed murder of Ziyauddin. Though the trial Court has found part of the evidence led by the prosecution as unreliable as the witness did not support the prosecution but even in absence of direct evidence the circumstantial evidence produced by the prosecution squarely covers the involvement of appellants-accused in the crime.

21. It is submitted that the ballistic report, which is independent piece of evidence, goes to establish the prosecution case that Ziyauddin was shot dead by using these fire arms as the projectiles found from the scene of occurrence i.e. the bullet / head part of the ammunition clearly tallied with the bullets fired from the pistol and .45 revolver along with the ammunition and, therefore, the appeal deserves to be dismissed.

22. The key issue which arise for our determination is whether the appellants-accused have committed murder of Ziauddin Naimul Haque Shaikh Usmani by using fire arms.

23. In so far as the prosecution case is concerned that the deceased Ziauddin's death was homicidal and caused by fire arm injuries, the same is not much disputed. It is a fact that on the fateful day Ziauddin @ Ziya as known to his family had come to Vikroli Park Side, Road No. 1, Lower Depot Pada, Room NO. 384 where his mother along with his brothers and their family members were residing. The deceased Ziya had come to stay with them on 19.1.2000 along with his family in his own car which was Maruti Zen. It was on 20.1.2000 at about 7.30 a.m. that he has gone out. Therefore, his brother Mohd. Jakaullha Namul Haque Usman (PW-4) on being requested by wife of Ziya came out to see why Ziya has not returned and he went towards the place where Ziya has parked his car i.e. in front of Maharashtra Bakery. It is at that time somebody called him and told that someone fired shot at Ziya. So he rushed towards the place where Ziya's car has been parked and noticed that in front of the driver's side he noticed Ziya sitting on the driver's seat and his right side leg had come out from that door; with his hand kept on the back of his head and eyes closed and he was bleeding. He noticed marks of injuries on his neck just near the chin. Therefore, Mohd. Jakaullha Namul Haque Usman called one Abral and with the help of Abral he put Ziya in an auto rickshaw and took him to Rajawadi Hospital where Ziya was examined and declared dead. Thereafter police came there and after dead body of Ziya was identified by

him, his statement came to be recorded which was treated as FIR (Exhibit-18). After inquest panchanama was prepared, the dead body of Ziya was sent to J.J. Hospital by WPSI Samant from the Park Site Police Station along with ADR No 10/00 and inquest panchanama. According to Dr. Vijay Tasgaonkar (PW-5), he performed the post mortem examination on the dead body and found the following injuries:-

> "(4) I found, the following external injuries :-
>
> (i) A fire arm injury on the Rt. side of the face. The bullet had perforated the facial bone and had gone out from the Lt. side of the face. I noted the dimensions of the injuries. I mentioned them in the P/M report.
>
> (ii) External Injury No.4 - bullet enters the Rt. side of the Neck, it includes Rt. external jugular vein, Rt. side of larynx and chin and comes out to the external injury No. 3.
>
> (iii) The bullet had brushed over Rt. side of the neck.
>
> (iv) Ext. Inj. No. 8, fracture 8th rib on

the Rt. side perforated Rt. & Lt. Lung and heart.

(v) Ext. Inj. No. 9 bullet perporte liver periteneum and Rt. Lung. Bullet comes out through Ext. Inj. No. 6.

(5) Injury No. 1 is an entry wound while Injury NO. 2 is the corresponding exit wound. Injury No. 4, is an entry wound while corresponding exit wound is mentioned at Sr. No. III in my report. Injury No. 8 is entry wound corresponding to the external injury No. 7, which is an exit wound.

(6) Totally four bullets had entered the body and had come out also from the body. I found, corresponding internal injuries such as fracture of facial bone, Rt. external jugular vein, Rt. side of larynx, both Lt. & Rt. Lungs, Hearts, Livers and peritonieum.

(7) The Internal Injury No. 1 was corresponding to the External Injury No. 1. The Internal Injury No. 2 as noted by me in my report, correspond to the External Injury No. 2. Internal Inj. No. 3 correspond to Ext. inj. No. 8. Int. Injury No. 3 corresponds to Ext. Injury No. 9."

The Doctor prepared notes of the post mortem examination in his hand writing which bears his signature and the same is Exhibit 20. In the opinion of Dr. Tasgaonkar (PW-5) all the injuries noted by him were ante mortem. The injuries were necessarily fatal. Except the external injury at sr. no. 5, all other injuries were sufficient in the ordinary course of nature to cause death and that these injuries could be caused by fire arm. The Doctor opined the cause of death to be haemorrhage and shock due to injuries to vital organs due to fire arm injuries, unnatural. The medical evidence to this effect has not been challenged. Therefore, there can be no doubt about the fact that the deceased was shot dead at the scene of occurrence and his death was homicidal.

24. It appears that the incident was witnessed by PW-15 Rahil Rafiq Shaikh who in his evidence has deposed to the effect that on 20.1.2000 while he was washing the rickshaw as usual at about 6.00 a.m. and for that purpose he used to fetch water from the well which is located near Maharashtra Bakery. At about 7.30 a.m. when he was fetching water at that time he heard some sound similar to the sound of bursting of crackers. He went a little ahead for seeing what has happened and saw two persons were shooting at a person who was in a white Maruti. Within a minute or two

thereafter, an autorickshaw came there and the said two persons showed gun to the rickshaw driver and went away by that rickshaw. He went near the Maruti Zen and saw that the person who was sitting in the driver's seat was injured and bleeding and he recognised him to be Ziya as he was residing in the neighbourhood. This witness has given registration number of Maruti Zen as D;-4CE-9443. According to this witness he has gone to Ziya's house and informed about the incident. Accordingly, Zaka Ullha came to the spot and Ziya was put in a rickshaw and was taken away by said Zaka Ullha. This witness claimed that he had seen the two persons who had fired at Ziya and subsequently in the Test Identification Parade held on 12.5.2000 at Aurther Road Prison he has identified the appellant accused Sunil Gaikwad and thereafter on 23.5.2000 again in another Test Identification Parade held at the Aurther Road Prison, he has identified the appellant accused no. 2 Sachin Khambe as the two persons who had committed the offence. In his cross-examination it has been brought on record that he had gone to the house of Ziya for informing about the incident along with Aslam who also washes vehicles. He did meet Jaka Ullha in Ziya's house but did not tell him that Ziya was shot by two persons. This witness has further admitted that it is correct that the fact that he had seen two persons with gun but has not told anyone till his statement came to be recorded by the police and that he did not accompany Jaka Ullha uptil the car of Ziya. Having

informed about the incident but saw that Ziya was taken to the hospital by his persons and he came back to Diamond Garage after informing the incident in Ziya's house along with one other.

25. Mr. Pasbola submitted that the conduct of this witness in not disclosing that he has seen the incident where two persons had shot Ziya but did not disclose to Jaka Ullha till his statement came to be recorded by the police which is admittedly after two days is sufficient to make his evidence suspect and that he is a got up witness. Whatever may be the case, the only direct evidence brought on record by the prosecution is through the evidence of PW-15 Rahil Rafiq Shaikh in so far as having witnessed the incident and identified the said persons who sought Ziya. For the present, let us examine if evidence of PW-15 Rahil Rafiq Shaikh is to be left in the zone of suspicion, what more credible evidence is brought on record by the prosecution to show the complicity? The next in the line is the auto rickshaw driver in whose auto rickshaw the assailants fled away from the scene of offence and Prakash Harishchandra Pidankar (PW-11). According to him, on 20.1.2000 he started his rickshaw as usual at about 7.30 a.m. and went to Godrej Petrol Pump and got the petrol filled. While he was going towards Park Site side he came to Road No. 1. At that time, suddenly two persons came. One of them placed his revolver touching the back side of the said rickshawala. The

other told him not to see behind and to take a 'U' turn from the Fire Brigade side and thereafter he was asked to take a right turn and then take the rickshaw ahead and then he was asked to go to L.B.S. Road. He went upto Macchi Market. There the two persons hurriedly left his rickshaw after paying Rs. 60/- towards his fare. He has also deposed to the effect as to what these persons were talking while they were travelling in his rickshaw. According to him, after these two persons have got down from the rickshaw, he went to his house and from there went to Surya Nagar Police Station and reported the incident. His statement was recorded by the police. (As can be seen from the evidence of PW - 15 Rahil Rafiq Shaikh and PW-11 Prakash Harishchandra Pidankar Park Side Police Station is also referred to as Surya Nagar Park Side Police Station). This witness was also taken for test identification parade 4-5 months thereafter but he could not identify the suspects in the parade. According to him, before he could say anything in the parade one of the person himself stated he is the culprit. Later on he came to know that his name was Sunil. After 15 days he was again called for test identification parade which was conducted by lady constable and there also the same thing happened. One person in parade said that he was the culprit but he could not identify him except for the fact that the other person was known as Sachin. This witness has not been able to identify the accused in court and, therefore, he was allowed to be

confronted by the learned PP in order to contradict him. In our view, PW-11 Prakash Harishchandra Pidankar do not further the prosecution case in any manner except for the fact that on the fateful day after Ziya was shot by the assailants, two of them boarded auto rickshaw of PW-11 Prakash Pidankar and were carried by him to the destination and thereafter they went to Police Station and informed the police, who recorded his statement.

26. The first and foremost piece of material evidence which the prosecution could collect is the recovery of articles i.e. projectiles (bullets, lead pieces thereof) found on the date of incident under spot panchanama dated 20.1.2000. WPSI Ms Nilam Samant (PW-18) in her evidence before the Court has stated that on 20.1.2000 while she was on duty at Park Site Police Station she received a message from Rajawadi Hospital to the effect that one person has sustained fire arm injury had been brought to the hospital and had succumbed to death before admission. Therefore, she visited Rajawadi Hospital along with other officers, saw the dead body. The brother of the deceased was present. His report came to be recorded in the hospital which was treated as FIR (Exhibit 18). Thereafter inquest panchanama (Exhibit - 9) was drawn in the presence of two panchas. She took charge of the clothes on the dead body and it consisted of articles 1 to 4 which were placed before the Court during trial.

Then they came back to the police station. From the police station she along with the staff went to the scene of occurrence which was near Himalaya Bakery. She drew the panchanama of the scene of offence and noticed a Maruti car. Two lead pieces of bullets were collected from the car. She collected sample of blood in the bottle under panchanama at Exhibit 15. One tooth (Article 7) was also found in the Maruti car. According to her, the lead pieces collected from the car are articles 8 colly. The said articles were taken charge of, were packed, labelled and sealed in the presence of panchas. The dead body was claimed by the bother of the deceased and it was handed over to him and his statement came to be recorded. Subsequently the clothes of the deceased were packed under panchanama exhibit-16. She has also deposed to the effect that on 20.1.2000 at about 4.00 to 4.30 p.m. a rickshawala by name Pidankar (PW-11) came to the police station and gave certain information. His statement was recorded and thereafter she handed over the investigation to P.I. Shri Dani. On this aspect there is no reason to disbelieve the witness in so far as it relates to seizure of two lead pieces of bullets from the scene of offence. We propose to refer to the forensic report in reference to the two lead pieces of bullets (Article 8 collectively) along with the forensic report of the fire arms and ammunition seized from the two accused persons. Before that, let us see whether the prosecution has established the fact that

the two appellant accused were arrested and they were found in possession of the fire arms and ammunition attributed to them. It is the prosecution case that the appellant accused no. 1 came to be apprehended on 3.2.2000 by DCB CID Unit VI and on his search the police found that they were in possession of 9mm pistol bearing No. 39786 (Art.9), 0.455, 4 cartridges and 5 live cartridges of 9 mm bore (article 10), 5 rounds of 9 mm cartridges (article 11) and a magazine (article 12). This search and seizure of the fire arms from these two accused has been made by two teams of police officers. First is in case of appellant accused no. 1 who came to be arrested on 3.2.2000 by police officers consisting of PW-6 PSI Prinam Namdeo Parab (PW-6) and PSI Ganesh Kashinath Lahane (PW-7). The search and seizure came to be concluded in the present of PW-8 Mohd. Imran Mohiddin Siddiqui. In his evidence Prinam Namdeo Parab (PW-6) has specifically stated that on 3.2.2000, the Sr. P.I. of Unit-VI, Shri Chate called him at about 8.00 a.m. and informed him that he has received information that a member of Chhota Rajan Gang by name Sunil Gaikwad was to come near New Welcome Hotel at Ghatkopar to meet his associates and that he will be having a fire arm with him and directed them to arrest the said person so they laid a trap and as soon as they sighted the appellant accused Sunil Gaikwad who was identified by the informer, they accosted him and when they conducted his personal search they found one pistol inside the pant which had been covered by the

shirt. The said Pistol was of back colour, Balgerian made and there were letters 'FN Browning', 'made in Balgeriya' having number 39786' on the body of the pistol. On the other side of the Barrel Guard, there were words "9MM Auto Pistol, 9 rounds only". The same number was found on the butt of the pistol and according to him it was an auto loading pistol. They have unloaded the pistol by removing the cartridges from the magazine. Five live cartridges of 9MM were found in the magazine. In his personal search, four live rounds of .45 Bore were found in his right side pant pocket. The said suspect had no licence. The fire arms and ammunition along with magazine and rounds came to be seized, packed and sealed in different packets as Exhibits A, B, C & D of which panchanama was prepared. The officers have identified the original accused no. 1 Sunil Gaikwad as the same person and case vide 10/2000 came to be registered against him. According to these officers, both the appellants-accused came to be arrested and they have tendered before the Court the report received from the C.A. Exhibit 24. On receipt of the report from the C.A., they have obtained sanction from the D.C.P., Head Quarter for prosecuting the accused vide Exhibit 25 and charge sheet came to be filed on completion of the investigation against the appellant accused in the Court of Addl. C.M.M. 3rd Court, Esplanade, Mumbai. It appears that thereafter during the investigation, the involvement of the accused Sachin Gaikwad in the

case of murder of Ziyauddin within the jurisdiction of the Park Site Police Station came to be disclosed and, therefore, his custody was taken over by the Park Site Police Station for investigation.

27. In respect of the appellant accused no. 2, he came to be arrested by the police officers led by Sohel Mohd. Siddiq Buddha (PW-10) who was attached to the Anti Extortion Cell, North/West Region who was concerned with investigation of Crime No. 31/00 registered at the Santacruz Police Station on 21.1.2000 in connection with attempt on the life of Cine Star Rakesh Roshan. According to PSI Sohel Mohd. Siddiq Buddha (PW-10) during the course of investigation they had apprehended some culprits and during the course of investigation they learnt on 29.3.2000 that some of the wanted accused in the case i.e. Sachin Khambe (appellant accused no. 2), Anant Jadhav & Abdul Rehman Mamuni and pursuant to the said information the police party left Santacruz Police Station at about 14.05 hrs. and kept a watch near Ambedkar College, Tilak Road, Wadala. They noticed, a taxi coming from R.A. Kidwai Marg which stopped in front of a Bus Stop opposite Ambedkar College. Then three passengers got down and crossed the road and went towards the footpath outside Ambedkar College. The police officers then apprehended them. PSI Buddha apprehended Sachin Manohar Khambe (i.e. the appellant-accused no. 2) and the other accused were arrested by other members of the staff.

Thereafter in the presence of the panchas, search of the accused no. 2 Sachin Manohar Khambe was taken and they found one mobile telephone with him. PSI Buddha removed the SIM card from the said mobile and recorded the details of the instrument as well as the said SIM Card in the panchanama. In his personal search, they also found one revolver on his person tucked on his left side on the waist. It was .45 Caliber having fixed chamber of 6 rounds. The revolver was unloaded and it contained 6 live cartridges. There was marking on the revolver as 44447 and on the cartridges as 'KF 92 2'. All these articles were packed in transparent plastic bags. The bags were sealed. Labels bearing the signatures of panchas and PI Joshi were affixed on the packets. The packets were marked as 'A-1 to A-4'. They found fire arms on search of other co-accused also which are not relevant to the present case. PW-11 PSI Buddha (PW-10) in his evidence identified mobile phone (Article 13), SIM Care which was in the mobile phone (Article 13) and .45 revolver (Article 16) bearing no. 44447 which was near the trigger guard. These articles were sent to ballistic expert by PI Joshi. The arrest of the accused persons was also informed to the Park Site Police Station.

28. Much hue and cry has been made with regard to the arrest of the accused persons and seizure of the arms and ammunition from their person. We find that the trial Court has dealt with all the contentions made

by the learned counsel for the appellants accused in the present case and was justified in holding that the prosecution has established that the appellants-accused were arrested at the requisite places by the police party and from their search the police had been able to seize fire arms and ammunition which were forwarded to ballistic expert.

29. In the course of investigation, the involvement of these appellants accused was found in the case of murder of Ziyauddin, they were arrested at the Park Site Police Station and the fire arms, ammunition and articles were recovered. We find that the arrest of the appellants accused and the seizure of fire arms and ammunition from them is a evidence in the nature which can be safely relied on. It is only during the investigation that they were found involved in the murder of Ziyauddin that they were taken over in custody for the purpose of investigation in the case of murder of Ziyauddin. We find that the view taken by the trial Court that the prosecution has been able to establish that the two lead pieces of bullets found in the Maruti Zen car belonging to Ziyauddin in which he was shot dead. The material piece of evidence which connects the appellants accused with the two pieces of projectiles have been found is the ballistic report received from FLS, and appears to have been fired from the fire arms seized from the accused persons stands duly established by the ballistic report, for which no

plausible explanation has come from the appellants accused. On the other hand, the appellants accused have not disputed this fact of search and seizure of fire arms and ammunition except for appellant accused no. 1 disputing the date of his arrest. Further, we have no reason to disbelieve the prosecution on this count.

30. Now we come to the ballistic report dated 4.7.2000 which has been received from the forensic science laboratory in MCOC Spl. Case No. 13/2000. The report is dated 4..2000 addressed to the Senior Police Inspector, Santacruz Police Station and records that the FSL has received eight sealed plastic parcels in connection with C.R. No. 31/2000 under PIC Section 307, 34, 120(B) read with 3, 25, 27 of Indian Arms Act and found that the eight sealed plastic parcels, seals perfect and as per copy sent and the results of analysis is as under :-

"RESULTS OF ANALYSIS

. Exhibit 1 is a six chambered .455" caliber revolver in working condition. Residue of fired immunition nitrite was detected in the barrel washings, of revolver Ex. 1 showing that the revolver Ex.1 was used for firing prior to its receipts in the laboratory.

. Randomly selected two .455" revolver cartridges from Ex.2 were successfully test fired from the .455" revolver Ex.1 remaining four intact .455" revolver cartridges from Ex.2 will be returned."

The ballistic expert has also commented on the deformed .455" revolver in Exh. 1B of BL-161/2000 (Park site police station, Vikhroli, C.R.No.10/2001) has opined that it tallies with the bullets fired from the .455" revolver Exh.1 of present case, in respect of numbers and widths of the lands and grooves, direction and extent of twist of riflings and the characteristics striations observed on the land and groove impression showing that the .455" revolver lead bullet in 1B of BL-161/2000 has been dire from the .455" revolver Exh.1 of present case.

31. Another ballistic report is dated 17.6.2000 in M.C.O.C. Special Case No. 13/00 @ 1028/00 addressed to the Sr. Police Inspector, D.C.B.C.I.D. Unit - VI, Ghatkopar, Mumai which is in respect of arms and ammunition seized from the appellant accused no. 1 and the result analysis has been given as under :-

"RESULTS OF ANALYSIS

. Exhibit 1 is a 9mm pistol in working condition. Residue of fired ammunition-nitrite

- was detected in the barrel washings of pistol Exhibit 1, showing that the pistol Exhibit 1 was used for firing prior to its receipts in the laboratory.

. Randomly selected two 9 mm pistol cartridges from Exhibit 3 were successfully test fired from the pistol Exhibits 1. Remaining three intact 9 mm pistol cartridges in Exhibit 3 will be returned.

. The magazine in Exhibit 2 is easily seats into the butt stock cavity of 9 MM pistol Exhibit 1.

. Randomly selected two .455" revolver cartridges from Exhibit 4 were found to be live on test firing from the .455" revolver available in the laboratory. Remaining two intact .455" revolver cartridges will be returned.

. The characteristic lengthwise superfacial brushing marks observed on the surface of the deformed cuprojacketed 9 mm pistol bullet in Exhibit 1A of BL-161/2000 (Park site Police Station, Vikhroli, C.R.No.10/2000) tallies with the bullets resulted from the test firing of 9 mm pistol cartridges through the 9mm pistol Exhibit 1 of the present case, showing that the

9 mm cuprojacketed bullet in Exhibit 1 A of BL-161/2000 has been fired from the 9 mm pistol Exhibit 1 of present case."

32. The last para of the ballistic report clearly fixes identity of the 9 mm pistol cuprojacketed in which bullets were found i.e. 9 mm pistol in Exhibit 1A of BL-161/2000 (Park Site Police Station, Vikhroli, C.R. No. 10/2000) has been fired from 9 mm pistol Exhibit 1 of the present case.

33. There can be no hesitation on the basis of forensic evidence in respect of the fire arms and ammunition that it was the arms and ammunition which came to be seized from the appellants accused on their arrest which were utilised for commission of murder of Ziauddin. The evidence to this effect can be safely relied upon for the very reason that the appellants accused have been arrested at different points of time by different teams of police officers who are not at all concerned with the investigation of crime no. 10/2000 registered with the Park Site Police Station, Vikhroli. Though it has been contended that the weapons have been foisted on the appellants accused and the appellant accused no. 1 Sunil Gaikwad has been arrested earlier to the time than shown in the arrest panchanama and that the fire arms and ammunition recovered from them were not properly sealed as the panchas did not support the prosecution. The identity

of the fire arms remains unquestionable as the search and seizure panchanama records its distinguishing features and even the appellants accused have not disputed this fact. Therefore, for want of any plausible explanation from the appellants accused, in respect of their possession of the arms and ammunition which are used for committing murder of Ziauddin can lead to a necessary inference that these are the arms and ammunitions which have been used for commission of the murder as it stands well established by the forensic report.

34. Now, we are left with the confessional statements of the appellants recorded under the MCOC Act, 1999. The main contention of the learned counsel for the appellants is that the appellants accused have retracted their confessions at the earliest opportunity. Even if it is accepted that such confessions were made this goes to indicate that it was not voluntarily made, neither it has any grain of truth but the investigating agency has prepared these two pieces of evidence in the form of confession by invoking the provisions of the MCOC Act, 1999.

35. Another contention is that proper procedure as laid down under the Act and the Rules framed thereunder for recording confession had not been complied with. And the last and crucial issue raised in defence is that a confessional statement recorded under the

provisions of the MCOC Act, 1999 could not have been used against the appellants accused as they having been not found guilty of any of the offences under the said Act of 1999.

36. We propose to deal with the last contention first. Now, it is well settled by Five Judge Bench decision rendered by the Supreme Court in the case of Prakash Kumar alias Prakash Bhutto vs. State of Gujarat, reported in (2005) 2 SCC 409, which pertains to identical provisions under the Terrorist and Disruptive Activities (Prevention) Act, 1987, particularly in paragraphs 18 and 40 of the reported decision the Supreme Court has dealt with the provision as under :-

> "18. The questions posed before us for the termination are no more res integra. In our view, the same have been set at rest by the three-Judge Bench decision rendered in Nalini ((1999) 5 SCC 253)). The rigours of Sections 12 and 15 were considered in Nalini case and a finding rendered in paras 80, 81 and 82 (SCC p. 304) as under:
>
> > "80. Section 12 of TADA enables the Designated Court to jointly try, at the same trial, any offence under TADA together with any other offence 'with which the

accused may be charged' as per the Code of Criminal Procedure. Sub-section (2) thereof empowers the Designated Court to convict the accused, in such a trial, of any offence 'under any other law' if it is found by such Designated Court in such trial that the accused is found guilty of such offence. *If the accused is acquitted of the offences under TADA in such a trial, but convicted of the offence under any other law, it does not mean that there was only a trial for such other offence under any other law.*

81. Section 15 of TADA enables the confessional statement of an accused made to a police officer specified therein to become admissible 'in the trial of such a person'. It means, if there was a trial of any offence under TADA together with any other offence under any other law, *the admissibility of the confessional statement would continue to hold good even if the accused is acquitted under TADA offences.*

82. The aforesaid implications of Section 12 vis-a-vis Section 15 of TADA have not been adverted to in Bilal Ahmed case. Hence the observations therein (at SCC p.

434, para 5) that

> 'while dealing with the offences of which the appellant was convicted there is no question of looking into the confessional statement attributed to him, much less relying on it since he was acquitted of all offences under TADA'

cannot be followed by us. *The correct position is that the confessional statement duly recorded under Section 15 of TADA would continue to remain admissible as for the other offences under any other law which too were tried along with TADA offences, no matter that the accused was acquitted of offences under TADA in that trial."* (emphasis supplied)

We are in respectful agreement with the findings recorded by a three-Judge Bench in Nalini case.

"40. For the reasons aforestated, we are of the view that the decision in Nalini case has laid down correct law and we hold that the confessional statement duly recorded under Section 15 of TADA and the Rules framed thereunder would continue to remain admissible for the offences under any other law which were tried along with TADA offences under Section 12 of the Act, notwithstanding that the accused was acquitted of offences under TADA in the same

trial."

37. It is a trite law that the retracted confession may form the legal basis of a conviction if the Court is satisfied that it is true and voluntary. The Court in a particular case may be convinced of the truth of the confession and act upon it without corroboration. Therefore, such type of evidence can be very well tested if the confession is found to be voluntary and if so it is further found to be true and trustworthy and it is only the rule of prudence to seek for corroboration.

38. Mr. Pasbola, the learned counsel appearing for the appellants submitted that non-compliance of the provisions of the MCOC Act, 1999 and the Rules and the manner and the nature of confession recorded by the police officers are thus indicative of the fact that the confessions were not voluntary nor they are truthful.

39. It is submitted that they are a carbon copy and is prepared in a manner to merely bring on record evidence which otherwise the prosecution could not collect against the appellants accused.

40. In so far as the procedural safeguards are concerned, we have examined the evidence of the officer

i.e. DCP Swaroopsingh K. Padavi (PW - 16) who has recorded the confessional statements of the appellants accused. We find that though technically the contention of the learned counsel may be right about compliance of the requirements for recording confessions under the said provisions but if its substance is taken into consideration it does not in any way affect the authenticity of the procedure adopted by the witness in recording the confession and there appears to be substantial compliance of the provisions and Rules framed under the MCOC Act, 1999. In order to satisfy ourselves we have cross-checked the confession with the evidence brought on record and we find that it stands broadly corroborated. The eye witness in the case, Rahil Rafiq Shaikh (PW-15) does speak of the two assailants who shot Ziauddin in his car and whom he has identified in the test identification parade. We do not think that the evidence of this witness deserve to be disregarded for the reason that Mohd. Jakaullha Namul Haque Usman (PW-4) brother of the deceased do not corroborate him and his statement came to be recorded after two days. The police did take note of his presence and Mohd. Jakaullha Namul Haque Usman in his evidence has referred to someone telling him that his brother has been shot. One can well visualise the frame of mind of Jakaullha at the time his FIR came to be recorded. As he was more concerned about his brother being shot than the person who informed him. There is no other witness

who has come forward to say that he informed Mohd. Jakaullha (PW-4) about his brother being shot. Further, this witness also speak of the fact that the assailants fled in an auto rickshaw which gets independently corroborated by the auto rickshaw driver Mr. Prakash Pidankar (PW-11) who according to WPSI, Nilam Samant (PW-18) on his own came to the police station and gave information about two persons having boarded his rickshaw and threatened him with fire arm and he dropped them at a particular place. This sequence of events does find place in the confessional statements of the appellants accused and their subsequent arrest, seizure of arms and ammunition and their complicity in the crime has been brought on record by leading independent evidence. It is also an accepted rule of evidence that confessional statement of an accused is a weak type of evidence and, therefore, if these confessional statements are taken into consideration along with the evidence brought on record it does indicate that the appellants accused having found themselves arrested for the offence of having committed the murder of Ziauddin did make a confessional statement and the two confessional statements read as a whole does reveal certain facts establishing their complicity in the crime which can be said to be within the exclusive knowledge of the appellants and that is indicative of voluntariness. About the truthfulness of the confessions, we have already said that the confessional statements of these

two appellants accused have been broadly corroborated by the evidence on record. Therefore, there is no legal impediment in considering the confessional statements of these two appellants accused while arriving at the finding that they are the persons responsible for committing the murder of Ziauddin.

41. Therefore, after considering the evidence in totality, we have no hesitation to arrive at a finding that the trial Court was justified in finding the appellants accused guilty of having committed murder of Ziyauddin by using the fire arms. Therefore, there is no merit in the appeal.

42. In the result, the appeal stands dismissed.

(J.N. Patel, J.)

(R.S. Mohite, J.)